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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL A. ADDUCI, SR., Petitioner.	2 CA-CR 2010-0047-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053210

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Judge.

¶1 Petitioner Michael Adduci, Sr. challenges the trial court's denial of post-conviction relief he requested pursuant to Rule 32, Ariz. R. Crim. P. After a jury trial, Adduci was convicted of manslaughter, child abuse, endangerment, driving under the

influence of intoxicating liquor (DUI), and driving under the extreme influence of intoxicating liquor (extreme DUI) with a blood alcohol concentration of .15 or more. The court sentenced him to time served on both DUI charges and to presumptive, concurrent prison terms for the manslaughter, child abuse, and endangerment charges, the longest of which was 10.5 years.

¶2 On appeal, Adduci argued the trial court abused its discretion in admitting evidence of his prior DUI conviction, causing reversible error. Although we agreed with Adduci that admission of the evidence was error, we concluded the error was harmless beyond a reasonable doubt and affirmed his convictions and sentences. *State v. Adduci*, No. 2 CA-CR 2006-0231 (memorandum decision filed Jan. 28, 2008). Our supreme court denied Adduci's petition for review of that decision.

¶3 Adduci filed a timely notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a). In the petition that followed, Adduci alleged, inter alia, "the erroneous admission of [his] prior DUI conviction and related collision influenced the jurors' verdicts, [and] it would be a manifest injustice to find the error harmless on the expanded post-conviction record."[1] Adduci maintained our harmless error finding was not binding on the trial court in post-conviction relief proceedings because our decision was "[b]ased solely on the cold trial transcripts." He argued he should be permitted in Rule 32 proceedings to develop and present evidence that the error was, in fact, prejudicial, in contravention of our finding. In support of his argument, Aducci submitted his own

[1]Adduci does not challenge the trial court's resolution of other claims he raised in his petition for post-conviction relief.

affidavit and those of his family members stating their observations of jury members when the evidence was presented. He also sought the court's leave to interview members of the jury on the issue of prejudice.

¶4 After a status conference, the trial court denied Adduci's request for discovery and issued its ruling denying relief on his claim that he had been prejudiced by the erroneous admission of evidence. The court found Adduci's claim and request for discovery were "precluded by the prior determination of the Arizona Court of Appeals that the admission of [Adduci]'s prior DUI at trial constituted harmless error." The court further stated that, had we not already ruled on the issue, it would have denied relief because other evidence of Adduci's guilt had been "overwhelming," the court had issued a limiting instruction, and, had Adduci been permitted to conduct discovery on the effect of the erroneously admitted evidence on jury deliberations, "the passage of time since trial in this case will have rendered juror recollections unreliable." *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim for post-conviction relief "one that, if the allegations are true, might have changed the outcome").

¶5 This petition for review followed. We review a trial court's denial of post-conviction relief on the basis of preclusion for an abuse of discretion. *State v. Jensen*, 193 Ariz. 105, ¶ 9, 970 P.2d 937, 938 (App. 1998). We find none here.

¶6 Adduci cites exceptions to "'the law of the case' doctrine" to argue we "should grant review and relief to clarify that a [Rule] 404(B)[, Ariz. R. Evid.,] harmless error finding on appeal necessarily is limited by being based on a cold appellate record, and to acknowledge the possibility of subsequently using Rule 32 proceedings to resolve

such fact-based questions."[2] Quoting *Dancing Sunshines Lounge v. Industrial Com'n of Ariz.*, 149 Ariz. 480, 482-83, 720 P.2d 81, 83-84 (1986), Adduci maintains the "law of the case" doctrine "'is generally held to be a rule of policy and not one of law'" and "it should not be strictly applied when it would result in a manifestly unjust decision," such as when "there has been a substantial change of evidence." He further notes Rule 32 proceedings often are preferred to direct appeals when claims require development of evidence outside the trial record, such as claims of newly discovered evidence or ineffective assistance of counsel. *See* Ariz. R. Crim. P. 32.1(e) (newly discovered evidence); *State v. Valdez*, 160 Ariz. 9, 14-15, 770 P.2d 313, 318-19 (1989) (ineffective assistance), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). Combining these two propositions, Adduci contends this court's harmless error finding "should not be binding in post-conviction relief proceedings in which facts and evidence not available to the appellate court could be developed."

¶7 Although the "law of the case" doctrine might be avoided as a matter of policy, *Dancing Sunshines*, 149 Ariz. at 482, 720 P.2d at 83, preclusion under Rule

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[2]According to *Dancing Sunshines Lounge v. Industrial Com'n of Ariz.*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986):

> The term "law of the case" refers to a legal doctrine providing that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested.

32.2(a) is a rule of law. *See* A.R.S. § 13-4232 (statutory counterpart to rule); *State v. Shrum*, 220 Ariz. 115, ¶ 12, 203 P.3d 1175, 1178 (2009) ("Rule 32.2(a) precludes collateral relief on a ground that either was or could have been raised on direct appeal or in a previous [post-conviction relief] proceeding."). "Because the general rule of preclusion serves important societal interests, Rule 32 recognizes few exceptions." *Shrum*, 220 Ariz. 115, ¶ 13, 203 P.3d at 1178.

¶8 Adduci fails to identify any section of Rule 32 that authorizes his claim or excepts it from the rule of preclusion. *See* Ariz. R. Crim. P. 32.2(b) (exceptions to preclusion). In his petition below, Adduci asked the trial court to vacate his conviction and sentence for manslaughter on the ground that erroneously admitted evidence of his prior DUI conviction "probably affected the jury's verdict." On its face, this is the same claim Adduci raised and we decided on the merits in his direct appeal, where we found "beyond a reasonable doubt that the verdict would have been the same had his prior conviction not been admitted." *Adduci*, No. 2 CA-CR 2006-0231, ¶ 18; *see also* ¶ 2, *supra*.

¶9 When our supreme court denied Adduci's petition for review and the time for seeking review in the United States Supreme Court expired, our decision became final. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (conviction final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). Because Adduci's claim for relief was "[f]inally adjudicated on the merits on appeal," he

is precluded by Rule 32.2(a)(2) from raising it in post-conviction proceedings, and the trial court did not abuse its discretion in denying discovery or summarily denying relief.

¶10 Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge